

# UNEMPLOYMENT INSURANCE ADVISORY COUNCIL REPORT



Covering Activities From November 2000  
Through November 2002

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Report prepared for the Governor and the Legislative  
Leadership, pursuant to s. 16.48, Wisconsin Statutes

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Wisconsin Department of Workforce Development  
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**MEMBERSHIP OF THE UI ADVISORY COUNCIL**

**Management Representatives**

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*James Buchen*

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*Earl Gustafson*

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*Edward J. Lump*

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*Robert Oyler*

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*Daniel Petersen*

**Labor Representatives**

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*Michael Bolton*

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*Red Platz*

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*Robert W. Lyons*

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*Phillip Neuenfeldt*

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*Dennis Penkalski*

**Chair**

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*Gregory A. Frigo*

## **BIENNIAL REPORT**

The Secretary of the Department of Workforce Development is required to report to the Governor and the legislative leadership every two years on the deliberations of the Council on Unemployment Insurance (Council). This report summarizes the deliberations and activities of the Council from November 2000 through November 2002. A report covering the activities of the Council from November 1998 through October 2000 was previously submitted. Copies of the previous report are available from the department.

## **BACKGROUND**

For over 60 years, modifications in the Unemployment Insurance (UI) Law have been a direct result of continuing efforts on the part of the Council and the legislature. The Council has a threefold statutory responsibility. First, the Council is to act as an advisor to the Department of Workforce Development (Department) in its administration of the UI law. Second, the Council is to report its views on pending legislation relating to UI to the appropriate committees of the legislature. Third, the Council is to submit its recommended changes in the UI law to each session of the legislature.

Law changes recommended by the Council to the legislature result from negotiations between management and labor members. The Council studies potential law changes on an ongoing basis; however, it is rare for the Council to approve suggested changes on a piecemeal basis. Rather, a total package of changes is negotiated. This approach helps ensure the recommended package will represent a balance of interests between management and labor. It also helps management and labor prioritize their recommendations, rather than accepting a suggestion simply because it was raised early in the legislative floor period.

Traditionally, the legislature has given great weight to the Council's recommended changes in UI law. This support of the Council process has helped ensure the continuing conformity of Wisconsin's UI law with federal requirements. Conformity is important because it allows Wisconsin

employers to pay a substantially lower federal unemployment tax (FUTA). In 2000, Wisconsin employers would have paid about \$1 billion in additional federal taxes if Wisconsin's UI law had not been in conformity with the federal law. Conformity also ensures that Wisconsin receives the federal funding necessary to administer the UI program. Wisconsin's entitlement is about \$50 million per year.

The legislature has also traditionally recognized the value of the Council process in bringing together into a single body the two groups most affected by the UI program, labor and management. The Council addresses controversial issues and attempts to resolve them to mutual satisfaction by balancing the cost of taxes to employers and the benefits paid to employees. The legislation recommended reflects the Council's concerns about the solvency of the unemployment fund, as well as the interests of those who pay for the program and those who receive its benefits.

The Council recognizes that it has an ongoing duty to communicate with the legislature on the status of deliberations, and about specific issues raised by members of the legislature. Nonvoting legislative representatives were added to the Council in July 1990 to help fulfill this communication responsibility.

## **MEMBERSHIP**

By statute, the 11-person Council consists of five members representing employers (management), including one member who specifically represents small businesses; five members representing employees (labor); and a nonvoting chairperson who is a permanent classified employee of the Department. Voting Council members are appointed by the Secretary of the Department of Workforce Development to serve staggered 6-year terms. The Chair is appointed by the Secretary to serve as long as the Secretary desires.

Membership on the Council has changed since the last report. The management vacancy created by the resignation of Jean Matthews was filled by the appointment of Daniel Peterson, Vice President

of Finance, J. H. Findorff and Sons, Inc., Madison. Management member and Small Business Representative Alfred T. Peck, Jr. of Green Lake resigned in November of 2002. Mr. Edward J. Lump, President of the Wisconsin Restaurant Association was appointed to fill the remainder of Mr. Peck's term and as Small Business Representative. Labor member Joseph Kiriaki retired at the end of his term in July, 2001. Mr. Roger Anclam of the United Auto Workers was appointed to replace Kiriaki. Mr. Anclam resigned from the Council in September of 2001. Mr. Red Platz, Sub Regional Director, United Auto Workers was appointed to fill that unexpired term. Labor member Michael Bolton and management member Earl Gustafson were reappointed for new 6-year terms in July of 2001.

Currently, only State Representative Jean L. Hundertmark is active among the four non-voting legislative representatives

The voting Council members, their affiliation and the dates their terms expire are noted below.

### **Employer Representatives**

James Buchen, Vice President/Government Relations, Wisconsin Manufacturers and Commerce Association, Madison, WI: term expires July 1, 2003.

Earl Gustafson, Energy and Projects Manager, Wisconsin Paper Council, Neenah, WI: term expires July 1, 2007.

Edward J. Lump, President and CEO, Wisconsin Restaurant Association, Madison, WI: term expires July 1, 2005 (Small Business Representative)

Robert Oyler, President, Capital City Harley-Davidson and The Employer Group, Inc, Madison WI: term expires July 1, 2005.

Daniel Peterson, Vice President of Finance, J.H. Findorff & Sons, Inc., Madison, WI: term expires July 1, 2003.

### **Employee Representatives**

Michael Bolton, International Representative, United Paperworkers International Union, Plover, WI: term expires July 1, 2007.

Robert W. Lyons, Executive Director, Council 40, American Federation of State, County and Municipal Employees, Madison, WI: term expires July 1, 2003.

Phillip Neuenfeldt, Secretary/Treasurer, Wisconsin State AFL-CIO, Milwaukee, WI: appointed August 9, 1995: term expires July 1, 2003.

Dennis Penkalski, Business Manager, Milwaukee & Southeast District Council of Carpenters (retired), Milwaukee, WI: term expires July 1, 2005.

Red Platz, Sub Regional Director, United Auto Workers Region 4, Oak Creek, WI: term expires July 1, 2007

## **PROCEDURES**

### **Business Meetings**

The Council generally meets every five to six weeks. Meeting agendas are mailed to Council members about one week prior to the meeting. The Council accepts, at any time, written comments and suggestions about the UI law from legislators, employers, employees and the general public. Oral presentations at Council meetings are allowed at the Council's discretion. Council meetings are tape-recorded and summaries of each meeting are prepared. The Council met 15 times during this reporting period.

The Council votes on motions made and seconded. By law, seven votes out of ten are required for the Council to approve proposed law changes. A record is kept of all votes.

When correspondence to the Council is received, the Chair sends a response advising the writer that the letter will be shared with the Council. Each Council member is provided with a copy of such

correspondence. Each letter is listed on the agenda as a discussion item. This provides a formal opportunity for the Council to address the suggestion and to request further study by the Department. Interim letters are sent to law change suggestors informing them of the Council's action regarding their proposal. Once the Council has decided upon a law-change package to recommend to the legislature, the Department informs letter writers of the final action taken by the Council.

The Council uses a standardized format for analysis of suggested law changes. The analysis, which is prepared by the Department, includes a description of the suggested law change, the reasons for it, the history and background of any current provision, any federal or state law issues relevant to the proposal, the policy and fiscal effects of the proposed change, and the administrative feasibility and impact of the proposal.

Council meetings are subject to the Open Meetings Law and advance public notice of each meeting is provided. The Open Meetings Law does, however, provide an exemption for the Council, which allows labor and management to hold separate closed caucuses to discuss potential law changes.

### **Public Hearings**

The Council held the following public hearings during this reporting period:

Pewaukee	May 23, 2002
Green Bay	June 28, 2002
Eau Claire	July 25, 2002
Madison	September 26, 2002

### **ISSUES RESOLVED IN THIS REPORTING PERIOD**



The Council receives numerous suggestions for changes in the UI law from the Department, legislators, employers, employees and others concerned about the UI program. The Council selects proposed law changes for Department analysis and further consideration. The following is a synopsis of the proposed law changes which were adopted by the Council, recommended to the legislature and enacted by 2001 Wisconsin Act 35 and 2001 Wisconsin Act 43.

### **Major provisions of 2001 Wisconsin Act 35**

#### **Benefits**

Act 35 increased the maximum weekly benefit rate from \$305 to \$324 for 2002 and to \$329 for 2003. There was no benefit increase in 2001.

The Act also changes the minimum weekly benefit rate from \$45 to \$48 2002 and to \$49 2003. There was no increase for 2001.

#### **Administrative Rules**

Act 35 directed the department to develop and implement the following administrative rules related to benefits:

##### **Allow unemployment benefits for workers available to work thirty-two hours a week**

The new rule will allow payment of unemployment benefits to qualified claimants who are available to perform at least thirty-two hours of work per week. Prior to Act 35, the standard for availability was thirty-five hours. The department is currently in the process of promulgating this rule.

##### **Establish misconduct standards for repeated absences or tardiness resulting in disqualifying claimants from unemployment benefits**

Act 35 directed the department to develop administrative rules that specify levels of absenteeism and tardiness that constitute misconduct. The intent of the change is to increase certainty for employers and employees in ambiguous situations involving absence and tardiness. The suggested numbers of absences and instances of tardiness without notification to the employer were three and five, respectively. Because violation law can result in total loss of wage credits, current law also requires the department to consider the reasons for the absence or tardiness even if the employee is not required to provide them when notifying the employer of the absence or tardiness. Both the Unemployment Insurance Advisory Council and the legislature are expected to review the rules before they are adopted.

Extend the deadlines for filing initial and resumed claims by seven days

Under prior law claimants were required to file an initial claim before the close of the week for which they intended to receive benefits. Claimants had to meet the same filing deadline for any resumed or additional claim, which was defined as one following a week for which no valid claim is made. Act 35 directed the department to promulgate an emergency rule that required filing for these two types of claims within seven days from the close of the week for which the claimant intends to receive benefits. Claimants continue to have fourteen days from the close of the week for which they intend to receive benefits to file a continued claim, which is defined as a claim that follows a week for which a valid claim has been filed. The change is expected to reduce the need to investigate late filings which result in payment of benefits when exceptional circumstances prevent timely filing. The permanent rule change went into effect on 12/01/02.

Specify what constitutes an establishment for the purposes of disqualifying a claimant from unemployment benefits during a labor dispute

The department was directed to develop an administrative rule to clarify current administrative and judicial interpretations of what constitutes an “establishment” under existing provisions that require disqualification of a claimant who has left or lost work with an employing unit because of a labor dispute in the establishment at which the employee is or was employed. There are a few occasions on which the department or a court could find that multiple plants within the same

employer's business constitute the same establishment. The administrative rule would clarify the circumstances under which multiple plants will be considered the same establishment.

#### **Phase out Social Security offset of unemployment benefits**

Prior to Act 35, unemployment insurance claimants had their benefits reduced by fifty percent of the amount of Social Security Benefits they received on the basis of their own employment. The new law reduces the offset to twenty-five percent in 2002, and eliminates the offset in 2003. This offset provision was in the Wisconsin law because of a federal requirement. The change was urged on the Council by numerous legislators and claimants over a period of years and was enabled by a subsequent U.S. Department of Labor interpretation of federal law.

#### **Charge the fund's balancing account when proper notice of recall is sent but not received**

An individual who fails to return to work when duly recalled within fifty-two weeks of a lay off may be disqualified from receiving unemployment insurance benefits until four weeks elapse and the individual earns four times his or her weekly benefit rate. If the individual later requalifies and receives benefits, the amount of those benefits attributable to wages paid by the recalling employer prior to the recall is charged to the Fund's balancing account. Sometimes an employer properly recalls an individual but the notice is not received. Under prior law benefits attributed to the recalling employer were charged to the employer's account. Under the new law benefits attributable to the recalling employer are charged to the Fund's balancing account. It is important to note that several elements must be present in the situation described. First, employees affected by this situation have an obligation to keep the employer informed of their whereabouts. Second, the employer must provide evidence that it gave the employee proper notice of a bona fide offer of work and that the notice was not received. Perhaps the best evidence an employer could provide is a returned registered letter.

#### **Charge the reserve fund's balancing account for certain benefits paid to displace workers who quit specified jobs to enter programs authorized under the Trade Adjustment**

## **Assistance Act (TAA) and the Economic Dislocation and Worker Adjustment Assistance Act (EDWAA).**

When workers lose jobs to foreign competition they are eligible for both unemployment benefits and federally funded specialized job training. If no training or comparable work is immediately available, they may receive unemployment benefits. However, many choose to take full-time work requiring less than their previous skills and offering a lower rate of pay. If federal training becomes available during this employment, the worker may quit to enter the training. If the interim job met precise federal standards, the worker may also collect unemployment benefits. Under the previous law, the employer then had its account charged for the worker's unemployment benefits. Under the new law, benefits will be charged to the Fund's balancing account.

About two thousand Wisconsin workers per year received training under EDWAA from 1990 through 1998. Another five hundred per year received training under TAA from 1990 through 1995. While the effect of this change on the Fund's balancing account is insignificant in a brisk economy; during a labor shortage, data does not exist to calculate the effect of the change if a recession occurs or if more funds were made available by the federal government for training.

### **Issue an annual report on fraud**

In February of each year the department will publish a report on the detection and prosecution of fraud. It will present the report to the Unemployment Insurance Advisory Council shortly after publication.

### **Verify claimants' work search efforts**

The department will sample and verify self-reported work search efforts. Most people who are out of work look for work, and the provision is not expected to disqualify many claimants. However, it will ensure that those who are not looking for work will not continue to receive unemployment insurance benefits.

**Extend the requirement to engage in at least two work search activities each week**

The department will continue until the end of 2003 to require claimants to complete two verified work searches per week to remain eligible for benefits. Beyond 2003, the department will determine by rule the kinds and numbers of activities that constitute a reasonable search for work.

**Taxes****Exclude certain non-immigrant visa holders from the unemployment insurance program**

Non-immigrant visa holders who are issued F1, M1, J1, or Q visas are permitted to work in Wisconsin for specific employers, in specific jobs and for a specific period of time. However, federal law excludes these individuals from unemployment insurance coverage. The change will match Wisconsin with federal law.

**Exclude from unemployment insurance coverage services to certain Medicaid recipients**

The new law excludes from the statutory definition of “employment” in-home nursing and respiratory care services to Medicaid recipients when provided by individuals certified by the Wisconsin Department of Health and Family Services as nurses in independent practice, independent nurse practitioners, or respiratory care providers in independent practice. As a result, Medicaid recipients who obtain these in-home services from the specified independent practitioners will not be found to be “employers” according to unemployment insurance law. Moreover, the reimbursement received by these providers is not subject to state unemployment insurance taxes and does not count as wages for purposes of determining unemployment insurance benefit eligibility or entitlement.

**Require tribes to participate in the state unemployment insurance program**

A change in federal law removes tribes from federal unemployment insurance coverage and requires them to participate in once-voluntary state unemployment insurance programs. In

Wisconsin all tribes had previously chosen coverage as taxable employers under the state program. The new law also requires states to offer to tribes the choice of taxable or reimbursing employer status. Under the latter, the state pays unemployment insurance benefits to qualified employees of the tribes, and the tribes reimburse the state for those costs. Previously, tribes could not choose to become reimbursing employers. Tribes will also be required to pay for one hundred per cent of extended benefits, which are available in times of high unemployment and were previously funded by federal unemployment insurance taxes. Tribes are no longer required to pay federal unemployment insurance taxes.

### **Give explicit statutory recognition to professional employer organizations**

A professional employer organization typically leases an entire work force to each of its clients and may include the corporate officers of the client in the terms of its contract. In contrast, a temporary help agency usually provides only a part of the client's work force. One advantage of a professional employer organization is that it may offer fringe benefits, such as health insurance, by acting as the employer of all of the workers that it supplies to many businesses. Giving statutory recognition to professional employer organizations helps to clarify that they are the employers of the leased workers, even if they share direction and control of the work with their clients.

### **Eliminate optional partial successorship**

Under prior law, when at least twenty-five per cent of a business was transferred from one unrelated employer to another, the transferee had an option, under certain circumstances, to assume the factors used in determining the unemployment insurance tax rate of the transferor. If the transferee did not choose to become a successor to the rating factors (the unemployment insurance account balance and taxable payroll) of the transferor, the transferee either started with a new employer tax rate if a new entity or, if already in business, treated the new workers for unemployment insurance tax purposes as if they were newly hired in an existing business. Under the new law an unrelated employer may not succeed to the rating factors of a transferor unless one hundred per cent of the business is transferred.

Under prior law all business transfers between related parties required the transferee to assume the rating factors of the transferor. Under the new law a transferee related to a transferor assumes the rating factors of the transferor only if one hundred per cent of the business is transferred or the transferor's unemployment insurance account balance is overdrawn. In all other cases the transferee receives a new employer tax rate or, if already in business, treats the new workers as if newly hired into an existing business.

**Permit deferral of sixty percent of first quarter taxes owed by employers with first quarter tax liability of \$5,000 or more**

Beginning no later than 2004, employers with a first quarter tax liability of \$5,000 or more may elect to defer a portion of the payment due. They may pay forty per cent of taxes due on first quarter payroll on the usual due date for these taxes, thirty per cent of taxes on first quarter payroll at the same time as taxes are due on payroll in the second quarter, twenty per cent of taxes on first quarter payroll at the same time as taxes are due on payroll in the third quarter, and the final ten per cent of their first quarter tax liability at the time taxes are due on payroll in the fourth quarter. In addition to the deferred taxes, employers would be required to pay all of the taxes due on second, third and fourth quarter payrolls on the usual due dates.

Taxes for many employers electing the option would be higher in one or more years following the first year of deferral. The deferral would lead to a lower June 30 employer account balance that may result in higher tax rates for a temporary period of time.

**Expand the use of liens to collect unpaid debts**

Under prior law, the department could file a lien with the circuit court to encumber a taxable employer's real and personal property for the purpose of collecting taxes, interest, and fees. The new law extends this practice to nonprofit and governmental employers that fail to provide required reimbursement for benefit payments and to those penalized for aiding and abetting fraud.

**Expand the use of levy powers**

Under prior law the department could seize the personal property of delinquent taxable employers for the purpose of collecting unpaid taxes, interest, and penalties. The new law extends this practice to fees, includes nonprofit and governmental employers that fail to provide reimbursement for benefit payments, and includes employers penalized for aiding and abetting fraud.

**Permit the department to use levy powers against certain third parties**

Under prior law the department could not levy the property of a third party who did not respond to the department's demand to turn over the property or wages of a debtor. Typically such persons are related to the delinquent taxpayer or benefit claimant who failed to repay an overpayment. The new law allows the department to levy the property of third parties that do not respond to the department's demand to turn over a debtor's property.

**Program Administration****Authorize the department to send electronic documents to employers requesting them**

Some employers prefer to receive official documents and notices by electronic mail, but the department has not been authorized to send official documents electronically. This change allows employers to accept electronic services voluntarily. It complements the department's existing authority to receive information electronically.

**Require electronic filing of quarterly unemployment insurance contribution reports by employer agents that report for twenty-five or more employers**

At present, twenty agents representing eight thousand employers voluntarily file quarterly contribution reports electronically. Another one hundred fifty agents representing about twelve thousand employers file paper reports. This change will reduce the department's bank fees by



about \$17,000 per year. It will also eliminate numerous staff hours spent manually entering figures from twelve thousand quarterly paper reports and correcting their errors.

Electronic reports would be required beginning the fourth quarter after the quarter in which the employer is subject to the requirement to file electronically. Under this change, agents that file contribution reports for twenty-five or more employers may be fined \$25 for each employer for whom a paper report is filed.

**Extend for two years the current administrative fee for upgrading technology**

Assessed at one hundredth of one per cent of taxable wages, the administrative fee will continue through December 31, 2003, unless extended by law again. The fee was also extended two years in 1999. The administrative fee is expected to raise \$2.4 million in 2002 and \$2.5 million in 2003. The fee will continue to be offset by an equal reduction in the employer's solvency tax rate. For example, a two hundredths of one per cent solvency rate will become one hundredth of one percent. The fee will not be charged to employers with zero solvency tax rates.

**Appropriate funds to repay the United States Department of Labor for disallowed costs of providing employment services to unemployment insurance claimants**

In 1998, the Unemployment Insurance Division conducted a successful pilot project providing employment services such as advanced skill training to unemployment insurance claimants. To provide these services, it used \$250,000 in federal funds for unemployment insurance administration. The United States Department of Labor subsequently disallowed the expenses and required repayment as the activities were not specifically for administration of the unemployment insurance program. Funds for repayment will be drawn from interest and penalties charged delinquent employers.

**Provide authority for fifteen federally funded project positions to handle regular workload of staff developing new automated systems**

Developing a new computer-based information system to aid in managing unemployment insurance taxes and benefit payments has required extensive input from staff in every bureau of

the Unemployment Insurance Division. Everyday work has become backlogged. Project positions utilizing available federal funds will be deployed to reduce backlogs and keep ongoing work current.

**Permit the department to hire retired administrative law judges during workload peaks**

Prior law required administrative law judges to be permanent state employees except in appeals in which they or the department were interested parties. The change permits the department to rehire retired personnel as limited term employees. The new law gives the department flexibility in responding to periods of peak work while simultaneously facing increasing retirements and fewer entrants into the labor market.

**2001 Wisconsin Acts 36 and 43: Temporary Supplemental Benefits**

At the end of October, 2001, Senators Jauch, Hansen, Wirsch, Baumgart, Burke, Plache, Breske, M. Meyer, Moore and Risser and Representatives Hundertmark, Staskunas, Sherman, Boyle, Turner, McCormick, Meyerhofer and Sinicki sponsored a bill which provided that if the Congress of the United States failed to enact a program of temporary emergency unemployment insurance benefits by January 1, 2002, then the Wisconsin Unemployment Advisory Council must make a recommendation to the legislature regarding state level temporary emergency unemployment benefits. In December of 2001, the bill was passed and enacted as 2001 Wisconsin Act 36.

On January 10, 2002, after the U.S. Congress had failed to act, and at the urging of Senator Robert Jauch, the Advisory Council voted to recommend to the legislature a Wisconsin program of temporary emergency unemployment benefits. On February 12, 2002 the legislature enacted the Council's recommended program as 2001 Wisconsin Act 43. The program provided up to 8 weeks of extended unemployment benefits to persons who had exhausted regular benefits, payable for weeks of unemployment beginning after March 2, 2002 and ending on December 28, 2002. Subsequently, the U.S. Congress did enact a federally funded temporary emergency

unemployment benefit program which granted up to 13 weeks of additional benefits. That program went into effect as of March 10, 2002 and also has an end date of December 28. Because the Wisconsin program provided that any federal program would take precedence, most of the extended benefits paid to Wisconsin claimants in 2002 were charged to the federal program and not to the Wisconsin unemployment reserve fund.

## **ISSUES PENDING RESOLUTION IN THIS REPORTING PERIOD**

### **Pending Conformity Issues**

DOL has directed the department to change its interpretation of “new work” in applying labor standards provisions to work in the temporary employment industry. This arises under federal law requiring that state law cannot deny benefits if a claimant refuses “new work” for which the wages, hours or other conditions are “substantially less favorable than prevailing for similar work in the locality”. Currently, as applied to temporary employment situations, the department is following the Wisconsin Court of Appeals decision in *Cornwell Personnel Associates, Ltd. v. Linde*, 175 Wis. 2d 537, 499 N.W.2d 705 (Ct. App. 1993), which the DOL does not consider correct. The department and temporary help industry representatives have been meeting with the DOL national office to seek changes in DOL’s interpretation. DOL is currently studying the issue.

### **Pending Administrative Rule Issues**

Establishing Specific Levels of Repeated Absenteeism or Repeated Tardiness Which Constitute Misconduct for Benefit Eligibility Purposes.

The UI law disqualifies a person from receiving benefits if the person was discharged by the employer for misconduct connected with the employment. As noted in the section of this report summarizing 2001 Act 35, the UI law now contains a provision which requires the department to

submit a proposed administrative rule which will establish specified levels of repeated employee absenteeism and tardiness which constitute misconduct for purposes of determining benefit eligibility. This rule is still under consideration and development.

Codification of a Definition of the Term “Establishment” for Purposes of Disqualification from Benefits When There Is a Labor Dispute in the Establishment Where the Employee Is Employed.

The UI law provides that a person who has lost his or her employment due to a labor dispute is disqualified from receiving benefits while the labor dispute is in active progress in the establishment where the person was employed. As noted in the section of this report summarizing 2001 Act 35, the UI law now contains a provision which requires the department to submit a proposed administrative rule which will specify, in accordance with applicable administrative and judicial interpretations, what constitutes an “establishment” for purposes of determining whether the disqualification should apply. This rule is still under consideration and development.